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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,
Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

REPLY BRIEF FOR APPELLANTS.

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Attorney for Appellants;

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REPLY BRIEF FOR APPELLANTS.

I.

Appellee devotes a considerable portion of his brief to the proposition that the provisions of Section 204(d) in effect constitute a statutory generalization of the principles involved in the doctrine of exhaustion of administrative remedies. It is argued, therefore, that wholly aside from the provisions of Section 204(d), the lower court properly dismissed the complaint. This argument is not sound. Section 204(d) does not generalize the doctrine of exhaustion of administrative remedies because that doctrine holds that if a party has an adequate remedy before the administrative branch he must exhaust that remedy before seeking judicial review in the courts. However, that doctrine likewise recognizes that if a party is daily losing his prop-

erty as a result of the act, regulation or order complained of, and there is no right to a stay of the operation of the act, regulation or order complained of, a court of equity has and should exercise its jurisdiction to prevent irreparable damage pending judicial review. (See cases cited, pp. 12-13, appellants' main brief). Furthermore, we have demonstrated in our main brief (p. 34) that where a statute denies an injunction to a public utility pending review of the fairness of a rate order the statute is unconstitutional as denying due process of law. It follows that when a person's property is being daily confiscated he has no adequate remedy unless he can get a stay pending review of the validity of the act, order or regulation complained of.

Appellee argues (Brief, p. 47) that the principle applied in the public utility cases and other types of cases where a stay is required as a protection against excessive or cumulative penalties is not applicable to the present act. Appellee asserts that this rule was developed in the cases where the only means of obtaining judicial review was by committing a violation and awaiting prosecution. He asserts that is not the situation in the present act. This argument is likewise untenable for two obvious reasons. In the first place, even though the origin of the rule as asserted by appellee may be assumed, its application has not been limited to cases where the only remedy was to violate an order and await prosecution. (See cases in our main brief, pp. 13, 33, 34). In the second place, there is no adequate remedy under the act open to appellants. The inadequacy of the remedy has already been demonstrated, but additional reasons will be set forth later herein.

In the cases relied upon by appellee for the proposition that a court of equity has no jurisdiction until the party exhausts his administrative remedies, it appears (1) that there was no danger of irreparable injury, or (2) that there

was at the time still open to the party an administrative remedy which he could pursue to challenge the validity of the act, regulation or order complained of.

In our case (1) the danger of irreparable damage is imminent and great (in fact, such damage is occurring daily); and (2) there is no administrative remedy open to appellants whereby they can challenge the validity of the act, order or regulation complained of. The cases relied upon by appellee therefore are inapplicable here.

Notwithstanding the assertion in appellee's brief that a federal district court has no jurisdiction of a complaint seeking relief against a challenged act or regulation where there is an administrative remedy, this court recognized the jurisdiction of a federal district court to entertain a complaint to review an order of the Bituminous Coal Commission where the act provided that the review of the Commission's order in the Circuit Court of Appeals or the Court of Appeals for the District of Columbia was exclusive. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56.

The attempted distinction of *Ex parte Young*, 209 U. S. 123 (1907), and cases following the rule therein laid down is likewise without merit. If, as is alleged in the complaint herein, packers refuse to slaughter because they must lose on each head of cattle slaughtered, it is clear that appellants' businesses are being confiscated daily. Except for the discrimination in the integrated business they would be able to obtain meat for distribution to their trade. As a result solely of the discriminatory nature of the Act and the regulations promulgated thereunder, they daily suffer losses because of their inability to obtain meat for distribution. This is as much confiscation as is an arbitrary and discriminatory rate under the utility cases already referred to.

The argument on page 42 of appellants' brief that it is not uncommon for final injunctions against a governmental entity to be stayed or postponed for very long periods cannot aid appellee. On the contrary, the cases cited by appellee reinforce appellants' argument because they necessarily recognize the court's judicial power to control its own decrees.

II.

In appellee's brief it is asserted that appellants may attack the validity of the Act as a defense to the criminal indictments, but cannot attack the validity of the regulations. At the argument, in response to questions from the court, this position was reiterated. In fact, it was enlarged upon by the assertion that no act of the Administrator could be challenged except by a protest to the Administrator under Section 203, and by an appeal to the Emergency Court of Appeals under Section 204 from denial of the protest.

This argument, as we understand it from appellee's brief, as well as from the statement made at the argument, is predicated upon the premise that the Act provides appellants with an adequate administrative remedy. Appellants have demonstrated that they do not have an adequate remedy under the Act. However, additional considerations will emphasize this lack of an adequate remedy. In fact, they will emphasize that appellants have no remedy with respect to the regulations under the construction given to the Act by the court below and by the appellee.

It must be remembered that appellants assert in the complaint that the Act, in its operation upon them is discriminatory and confiscatory, and as a result they are being deprived of their property without due process of law.

A sufficient factual basis is set forth in the complaint to permit evidence to be introduced to establish these allegations, and the facts need not be set forth herein. It is appellants' complaint that this non action of the Administrator causes the confiscation which daily deprives them of their property. It is their contention now reiterated that this non action is not the subject of a protest and subsequent review. This, it is submitted, is clear from an examination of Sections 203 and 204 of the Act. Section 203 provides that any person subject to any provision of a regulation issued by the Administrator under Section 2 may file a protest with the Administrator, setting forth objections to any provision of the regulation. If the protest is denied in whole or in part the party may then under Section 204 file a complaint with the Emergency Court of Appeals.

Section 204(a) provides that no objection to such regulation and no evidence in support of any objection shall be considered by the Emergency Court of Appeals unless such objection shall have been set forth in the protest to the Administrator. It is significant that under Section 204(a) the words, "regulation, order or price schedule", appear five times. Furthermore, this section specifically provides that:

> "Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding".

The exclusive jurisdiction vested in the Emergency Court of Appeals, therefore, is to set aside such regulation, etc. Nowhere is the court given jurisdiction, either exclusive or nonexclusive, to set aside any provision of the Act.

Even if it be admitted, which appellants do not, that there is merit in appellee's contention that the Emergency Court of Appeals can pass upon the validity of the Act in reviewing regulations promulgated by the Administrator, it is clear that such a review would have to be limited to Section 2 under which the regulation is promulgated. By no reasonable interpretation of the Act can it be said that the Emergency Court in reviewing a regulation under Section 2, could pass upon the validity of Section 3 of the Act. Furthermore, the section of the Act just above quoted limits the jurisdiction of the court to set aside the regulation and makes no provision for setting aside the Act by the Emergency Court.

The significance of the language of Section 204(a) becomes apparent in the light of the language of (b) that "the effectiveness of a judgment of the court enjoining or setting aside in whole or in part any regulation, order, etc." and in the light of the language of (c) that "the court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act". The jurisdiction conferred on the Emergency Court by the Act (Sec. 204(a)) is solely "exclusive jurisdiction to set aside such regulation order, etc."

In view of the foregoing provisions it is clear that the construction placed upon Section 204(d) by the lower court deprives appellants of any remedy whatsoever to review the Act and particularly Section 3 of the Act as it affects appellants as a result of the regulations promulgated under Section 2. This construction of the Section, it is submitted, for the reasons fully discussed in our main brief, renders it unconstitutional.

It is abundantly clear from the language of Section 204(d) that it purports to deny all courts, except as provided in Section 204 of all jurisdiction and power to "stay,

restrain, enjoin or set aside in whole, or in part, any provision of this Act authorizing the issuance of such regulations or orders". Section 3, challenged by appellants, does not authorize the issuance of any regulations. On the contrary it prevents the Administrator from issuing a regulation except upon certain conditions, and apparently those conditions specified have either not yet occurred, or if they have occurred the Administrator has not acted with respect thereto.

It therefore follows that there is nothing in the Act to prevent the lower court from setting aside Section 3 if it is unconstitutional. If Section 3 is unconstitutional as alleged, then, and only then, can appellants demonstrate that the regulation issued under Section 2 unconstitutionally deprives them of their property.

Furthermore, it is difficult to understand appellee's statement at the argument that the criminal court could pass upon the validity of the Act but could not pass upon the validity of the regulations in view of the fact that the unconstitutionality of the Act as applied to appellants could not be demonstrated without reading the Act in the light of the effect of the regulations upon appellants. (See *O'Gorman & Young* v. *Hartford Fire Ins. Co.* 282 U. S. 251; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194. Since the effect of the regulations could not be challenged before the Administrator for the reasons herein set forth, it is submitted that they have the right to challenge them as a defense to the criminal indictments and also in this suit.

The complete injustice of the judgment of the court below and of the position taken by the appellee in this court is conclusively demonstrated by the proceedings before the Small Business Committee of the House of Representatives.

We have already referred to Administrator Brown's statement before that Committee in our original brief (p. 40).

After hearing testimony for many days, from February 8, 1943 to April 9, 1943 a meat packing report was submitted to the Committee and a resolution was adopted on March 10, 1943 at a joint session of the Senate Committee on Small Business and the House Committee on Small Business, both of which are set forth in full as an appendix hereto. Briefly the report asserts that the following conclusions, among others therein set forth, are justified from the evidence presented to the Committee:

(1) That the regulations fixing meat prices do not provide a "generally fair and equitable margin" as required by the Amendment of October 2, 1942 to the Price Control Act;

(2) That the packing industry consists of a few very large concerns and of hundreds of other smaller concerns;

(3) That from twenty to forty per cent of the industry would be unable to continue in business at present O. P. A. prices and present live stock costs;

(4) That a continuance of the present price "squeeze" on the packers may well force as much as one-third or more of the continuing concerns of the country out of business;

(5) That the loss of typical packers ranges from 57¢ to $3.75 per head slaughtered;

(6) That the record before the Committee contains no satisfactory explanation of the long-standing failure of the O. P. A. to accord to meat processors a fair and equitable margin required by the Price Control Act.

These findings were made at or about the same time as the Administrator decided *In the Matter of Kaufman Beef*

Company, et al, (referred to at page 66 of Appellee's brief) wherein the Administrator found that "removal of inequalities in maximum prices has restored normal competitive relationships among purchasers in the live cattle markets".

In the light of the testimony before the Smal' Business Committee summarized in the report appended hereto, the decision of the Administrator in the case referred to demonstrates the utter inadequacy and futility of any remedy before the Administrator.

The right to file a petition for amendment of the regulations with the Administrator (see footnote, page 13, of Appellee's brief) affords appellants no adequate remedy because (1) a denial of the petition is not reviewable under the Act (O. P. A. Revised Procedural Regulations 1, Section 1300.20, 7 F. R. 971); and (2) no stay can be granted to protect appellants against irreparable damage while the application is pending.

Conclusion.

For the reasons herein set forth as well as the reasons set forth in our main brief, it is submitted that the judgment in the lower court should be reversed.

Respectfully submitted,

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Counsel for Appellants.

On the Brief:

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Appendix.

(From hearings before the Select Committee to conduct a study and investigation of the National Defense Program in relation to small business in the United States House of Representatives, Seventy-eighth Congress, First Session on H. Res. 18, April 8 and 9, 1943, Part 5 (Unrevised) pages 257-260).

MEAT PACKING REPORT, FEBRUARY 26, 1943.

It is essential to the successful prosecution of the war that the Nation have a maximum production of meat animals and meat products in order that the needs of our armed forces, of the civilian population, and of our allies may be met. Shortages of meat will adversely affect morale and substantial and continued shortages may actually interfere with the conduct of the war. The preparation for consumption of the increased production of livestock is dependent upon full utilization of the slaughtering and dressing facilities of the packers and the plants of processors of meat products. The packing industry consists of a few very large concerns and of hundreds of smaller concerns.

The committee has conducted hearings to determine the causes of the present shortage of meat and the accompanying black market. Witnesses representing meat packers and processors, the Department of Agriculture, the Office of Price Administration, and livestock producers were heard. On basis of the testimony of these witnesses, the following conclusions are justified:

1. The natural shortage of meat for civilian consumption which has inevitably resulted from the large demands of our armed forces has been aggravated by a price "squeeze" to which the packers have been subjected under the wholesale ceiling prices established by the Office of Price Administration. Under these ceiling prices the packers are said, for example, to be losing from $2 to $4 per hog slaughtered.

2. The shortage of meat has also been aggravated by a quota system imposed by the Office of Price Administration under which quotas for civilian sales are granted only to slaughterers and none are allowed to other processors. Under this quota system the nonslaughtering processors are dependent for supplies upon the willingness of slaughterers, in most cases the largest packers, to share their reduced civilian quotas with them.

3. A continuance of the present price "squeeze" on the packers may well force as much as one-third or more of the packing concerns of the country to discontinue operations because of heavy losses.

4. The ceiling prices established by the Office of Price Administration apply on purchases by the Government and its armed forces. The maintenance by Government edict of below-cost prices on products which the packer must supply on compulsory government orders is un-American and cannot be too severely condemned.

5. The "squeeze" in prices on legitimate sales and the discriminatory quota system have resulted in the worst "black market" in meats in the history of the country. The "black market" is injurious in three ways: (1) It provides in the markets meat from animals which have not been adequately inspected, if inspected at all, and subjects the population to the risk of eating diseased meat; (2) "black market" prices are so much above the ceiling prices as to operate in a substantial way to defeat the purpose of legislation directed against inflation; and (3) it places a penalty on honest operation of packing plants and processing plants and places a premium on dishonesty because of the enormous profits which result from "black market" operations.

6. The Office of Price Administration and the Secretary of Agriculture have adequate legislative authority to correct the maladjustment and injustice now in the meat in-

dustry, but they have not worked in close cooperation and have differed on important questions of policy.

Restricted Operations of Packing Plants

The War Manpower Commission has recognized that meat packing is an essential industry. The Department of Agriculture has emphasized the need for all existing packing plants in order to slaughter and prepare for consumption the large production of livestock which is necessary and is being encouraged to meet the needs of the Armed Forces, the civilian population, and our allies. A very substantial part of these facilities are threatened, however, with the necessity of discontinuing operations growing out of the losses suffered under the price maintained by the Office of Price Administration. The present shortage in meat supplies is substantially explained by the small volume of operations of many packers. The losses of the companies increase with the volume of business and in order to minimize losses while continuing to operate, many plants have reduced their slaughter to a minimum. One concern, which presented a witness to the committee, is slaughtering only 900 head of hogs per week, whereas its normal volume is 3,600 head. A representative of the Amalgamated Meat Cutters and Butchers Union, A. F. of L., testified that because of the bad price situation the packers have reduced employment to only 28 to 30 hours a week. The members are receiving only guaranteed minimum wages and are threatening a "holiday," not against the packers, but against the price "squeeze" suffered by their employers.

The Price Squeeze

The Price Control Act of 1942 was amended October 2, 1942, to provide: "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing."

This amendment has not been heeded by the Office of Price Administration. The evidence before the committee,

including specifically that of representatives of the Office of Price Administration charged with the fixing and administration of meat prices, is convincing that the present prices do not provide a "generally fair and equitable margin." The chief of the section charged with the establishment of meat prices "guessed" that from 20 to 40 percent of the industry would be unable to continue in business at present Office of Price Administration prices and present livestock costs. The pork prices now outstanding were established on basis of the cost to the packers of approximately $13.50 per hundred pounds, Chicago average. The prices of hogs at the time of hearing in mid-February was $15.75. At this cost for hogs there is no "margin" for packers. They are, in fact, losing from $2 to $4 per head slaughtered. The situation on beef is not so severe; but here also there is a failure by the Office of Price Administration to provide, as required by the Price Control Act, a fair margin. The beef prices now maintained by the Office of Price Administration are approximately $1 per hundred pounds below the normal margin and the loss of typical packers ranges from 57 cents to $3.75 per head slaughtered, depending on quality.

CONCLUSION

The record before the committee contains no satisfactory explanation of the long-standing failure of the Office of Price Administration to accord to meat processors the fair and equitable margin required by the Price Control Act. Unless the packers are assured such fair margins, the Nation is faced with increasing meat shortages and the possible loss of as much as one-third of the present plants. This problem has been allowed by the Office of Price Administration and the Secretary of Agriculture to remain unsolved although they have been aware of it for several months. There is as between the Office of Price Administration and the Secretary a regrettable lack of joint effort. The committee has made clear to the officials concerned that the present situation cannot be permitted to continue and that an immediate correction of the situation is necessary in the public interest.

RESOLUTION ADOPTED AT A JOINT SESSION OF THE SENATE COMMITTEE ON SMALL BUSINESS AND THE HOUSE COMMITTEE ON SMALL BUSINESS, MARCH 10, 1943

(As reported by a Subcommittee composed of Senators Stewart and Wherry and Representatives Patman and Ploeser)

Whereas the small meat industry, including small packers, processors, wholesalers and retailers, has complained for several months to the Small Business Committees of the House and Senate against various practices imposed upon them by the Office of Price Administration and the Department of Agriculture, which threaten to drive them out of business and disrupt the distribution of meat and meat products for essential civilian needs; and

Whereas the Small Business Committees of the House and Senate have held both joint and individual hearings and have otherwise investigated conditions in the meat industry and said committees as a result of said investigations and hearings are persuaded that the small meat industry, including the small packers, processors, wholesalers, and retailers, is in danger of being destroyed; and

Whereas the break-down in the civilian supply of meat and meat products has resulted from the failure of the Office of Price Administration and the Department of Agriculture to conform with the express mandate of the Congress in the Second Emergency Price Control Act of October 2, 1942, that "in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing"; and

Whereas the break-down in the civilian supply of meat and meat products has further resulted from the failure of the Office of Price Administration and the Department of Agriculture properly to guide the flow of meat and meat products through the orderly channels of distribution; and

Whereas Public Law 421, Seventy-seventh Congress, known as the Price Control Act, title I, section 2 (a), pro-

vides that the Administrator shall "appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be," and the said section further provides that "The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classification, differentiations, and adjustments therein"; and

Whereas the Price Administrator has not exercised said discretionary powers and has not set up such an advisory committee, as suggested in the act, and has not regularly consulted all segments of the meat industry—namely, the large and small slaughterer and nonslaughterer in the packing industry, the large and small processor; the wholesaler, retailer, and consumer; all of which has contributed to the break-down of normal distribution and the destruction of small businesses throughout the country: Now, therefore, be it

Resolved by the Senate and House Committees on Small Business, that—

1. The Office of Price Administration immediately establish fair and equitable margins between the price of livestock and the price ceilings set on sales of meat and meat products for all processors, packers, wholesalers, and retailers;

2. The Department of Agriculture and the Office of Price Administration immediately establish quotas for nonslaughtering packers as well as slaughtering packers and allocate adequate supplies to the small wholesalers and retailers in all areas of the country, so that when meat rationing is put into effect adequate initial inventories will be held by such packers, processors, wholesalers, and retailers; and

3. The Administrator of the Office of Price Administration immediately proceed to discharge his discretionary

powers under the Act (Public Law 421, 77th Cong., ch. 26, 2d sess.) by immediately establishing a meat industry advisory committee that will include in its membership equal representation for the large and small slaughterers and nonslaughterers in the packing industry, the large and small processors, the wholesaler, the retailer, and the consumer, which advisory committee shall be regularly consulted by the Office of Price Administration and the Department of Agriculture with regard to all new regulations, amendments to existing regulations, directives, orders, or any promulgations with respect to the form thereof and the classifications, and adjustments therein as the same affect the meat industry; and

4. Copies of this resolution be immediately forwarded to the Office of Price Administration and the Department of Agriculture and that this committee be advised promptly by the Price Administrator and Secretary of Agriculture of action taken.